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Possible reform of investor-State dispute settlement (ISDS)

Arbitrators and decision makers: appointment mechanisms and related issues

Note by the Secretariat

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I. Introduction

1. For the information of the Working Group, document A/CN.9/WG.III/WP.151 addresses the question of independence and impartiality of arbitrators and this Note addresses the related questions of the impact of arbitrator appointment mechanisms and desirability of reforms. This Note addresses the topic of desirability of reforms regarding arbitrators and decision makers in investor-State dispute settlement (ISDS) on the basis of the issues set out in both documents.

2. At its 35th session, the Working Group suggested that information on other legal frameworks on appointment mechanisms should be made available to the Working Group, in particular addressing international commercial arbitration and international courts and tribunals (A/CN.9/935, para. 46). This note includes information regarding these "comparators" and provides commentary on the relevance and reliability of information and data on individual issues, where appropriate.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic.[1]

4. While this Note provides information to assist the Working Group in its consideration of certain concerns in ISDS and the desirability of reforms, it does not seek to express a view on the issues raised, which is a matter for the Working Group to consider.

II. Appointment mechanisms and related issues

1. Assessment of identified concerns

5. In the current ISDS regime, appointment of arbitrators and decisions makers is most commonly made by the disputing parties and to a much lesser extent by appointing authorities, including arbitral institutions, tasked with assisting in the process. The fragmented nature of the ISDS regime therefore does not provide for a uniform process. How the tribunal will be composed, and the individual arbitrators selected, are governed by the applicable governing treaty provisions or specific contractual provisions and, if none, under the default rules of any relevant arbitral institution (such as those of ICSID) or the applicable ad hoc rules (such as those of UNCITRAL).

(a) Appointment of arbitrators in ISDS

Party appointment

6. The ICSID and UNCITRAL Rules have similar approaches to the process of appointment of arbitrators. They provide for a default three-party tribunal, with the parties each appointing one arbitrator (these two arbitrators are commonly referred to as the "co-arbitrators"). The co-arbitrators (UNCITRAL) or the parties (ICSID) themselves then appoint the presiding arbitrator by agreement.[2] Very few investment treaties address the appointment mechanisms, though some recent bilateral treaties

[1] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html. The preparation of this Note also benefitted from contributions by the following experts: Susan Franck, Jean Kalicki, Joost Pauwelyn, Sergio Puig and Maxi Scherer.

[2] At ICSID, the arbitral tribunal "shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties" (see article 37(2)(b)). Under the UNCITRAL Rules, "[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal (see article 9(1)). As a practical matter, even where appointment of the presiding arbitrator is formally done by the parties rather than the co-arbitrators, it is customary for the parties to agree that the co-arbitrators may be consulted, to ensure that the candidates under consideration for presiding arbitrator will be ones with whom the co-arbitrators have no objection to serving.

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have included developments as compared with what can be termed more "traditional" approaches.[3]

7. Arbitral rules do not set out a process that a party must follow in identifying and appointing an arbitrator. The parties are free to select any person to serve as an arbitrator provided that s/he meets the applicable criteria. The party engaged in the selection of a potential arbitrator will investigate qualifications and background. Such investigations, which sometimes include a limited interview, cover whether and where s/he has acted as arbitrator or counsel in ISDS cases, has advised the parties or related parties, issued publications and statements, and seek to gain insight into personality, reputation, technical skills, language abilities and approach to the arbitral process in general.

8. Guidelines designed to protect the integrity of the process and independence and impartiality of the potential arbitrator where interviews are conducted provide, among other things, that the interview should not seek to identify the potential arbitrator's views on the substance of the case. [4]

9. In the context of ISDS, where a State is involved, and the issues at stake usually invoke issues of public interest, concerns have been raised regarding the appointment of arbitrators by the parties (A/CN.9/935, para. 54).

Appointment by appointing authorities

10. The Working Group may wish to note that the Rules of ICSID[5] and UNCITRAL[6] foresee the intervention of an appointing authority to assist the parties in the appointment process.

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[3] In the Comprehensive Economic and Trade Agreement (CETA), appointments are made by a Joint Committee (which, pursuant to article 26.1, comprises "representatives of the European Union and representatives of Canada"). The Joint Committee appoints fifteen tribunal members, of whom five shall be nationals of a Member State of the European Union, five shall be nationals of Canada, and five shall be nationals of third countries (article 8.27.2). The Joint Committee also appoints members of the appellate tribunal, in a number to be later established by the Joint Committee (see Art. 8.28.3). The process is similar in the European Union-Viet Nam Free Trade Agreement, Chapter 8 II, Section 3, Art. 12(3) and Art. 13(2).

[4] For example, Guideline 8(a) of the IBA Guidelines on Party Representation in International Arbitration states that, "[a] Party representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest", but should not discuss the case (Guideline 8(d)).

[5] Where ICSID acts as appointing authority (if parties are unable to appoint all members of the Tribunal within 90 days of the registration of the request for arbitration), either party may request that the Chairman of the ICSID Administrative Council appoint the arbitrator(s) not yet appointed (see description of the process in document A/CN.9/WG.III/WP.146, paras. 52–55). The first stage is a ballot procedure. Where the ballot process results in a selection, it is considered to be a party-agreed appointment. Where the process does not result in agreement, ICSID names an arbitrator from the Panel (and the parties may raise any circumstance showing that the person lacks the qualities required under the ICSID Convention). ICSID seeks to complete this process within 30 days (https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx). It may be noted that the current process of revision of ICSID Rules addresses the matter; under the proposed revision, parties would be allowed to request assistance at any stage and they would have the ability to ask for different types of assistance including a (non-binding) ballot, a (binding) list process or otherwise (see "Proposals for amendment of ICSID rules — Synopsis, at para. 31, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf).

[6] Under the UNCITRAL Arbitration Rules, the default three-member tribunal allows the appointing authority to appoint a co-arbitrator or a presiding arbitrator if the party has not appointed its co-arbitrator or if the co-arbitrators have not agreed on a presiding arbitrator within 30 days (see arts. 8 and 9). The appointing authority uses a list procedure. The UNCITRAL Rules provide that the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and is to take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties (see also the ICSID submission in document A/CN.9/WG.III/WP.146, paras. 42–56).

11. The method of appointment itself and the shortlisting of appointed arbitrators on individual cases are governed by legal requirements and established practice to allow for a timely appointment of competent arbitrators when the parties or the co-arbitrators fail to do so. In practice, a list procedure (or ballot procedure) is a well-established practice. A shortlist is composed of qualified arbitrators selected by the appointing authority (depending on the circumstances of the case and taking into account the legal requirement such as nationality or impartiality), on an informal basis and sometimes after consultation with the parties.

12. Regarding appointment by an appointing authority, the main concern raised relates to the lack of transparency in the appointment process, as emphasized in the recent work of the Organization for Economic Cooperation and Development (OECD) on the matter.[7] Transparency in the appointment of arbitrators by appointing authorities may be considered at two stages: first, regarding the preparation and disclosure of lists (or pools) of proposed arbitrators and the process of selection for a particular case; and second, the disclosure of appointment activity by appointing authorities in ISDS.

13. The Working Group may wish to recall that the appointment process in ISDS, relying mainly on party-appointment and only at the margin on appointing authorities (see figures at paras. 11 and 44 of A/CN.9/WG.III/WP.146), has relatively recently been the subject of detailed scrutiny. Moreover, as noted above, arbitrators must fulfil certain requirements (nationality, experience) and failing to do so could trigger a challenge to that arbitrator by the opposing party, which is a situation that appointing authorities seek to avoid (see, in particular, the Permanent Court of Arbitration (PCA) submission in A/CN.9/WG.III/WP.146, para. 58).

14. As for the disclosure of appointment activity by appointing authorities, very little information is publicly available. It may be noted that arbitral institutions have recently taken measures in order to address the criticism of lack of transparency. In particular, some of the main institutions have allowed for more systematic disclosure about the appointment and the composition of arbitration tribunals.[8]

(b) Comparison with other adjudicatory systems

15. The Working Group may wish to note that the appointment mechanisms in ISDS are comparable to appointment mechanisms in commercial arbitration and State-to-State arbitration. They are, however, very different from the mechanisms regarding the appointment of adjudicators in international bodies, where a distinction should be made between selection of adjudicators to become a member of an adjudicative body and assignment of a specific case among adjudicators or to chambers,[9] and from common methods for judicial appointments at the national level.

16. As regards the appointment of international judges, States nominate candidates for international judicial office in an election or appointment process that is similar across many international courts and tribunals, albeit with some variations. The process is typically transparent in that it is set out in the relevant statutes or rules. In

[7] *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, Consultation Paper, March 2018, David Gaukrodger, Investment Division, Directorate for Financial and Enterprise Affairs, Organization for Economic Cooperation and Development, Paris, France.

[8] ICSID provides for disclosure of the composition of each arbitral tribunal. Other institutions that were in the scope of the OECD study (the Permanent Court of Arbitration (PCA), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)) do not publish information related to the arbitrators' identity or qualification except with party consent. As a practical matter, however, many appointments do become public knowledge, either through mutual consent (resulting for example in listing on the PCA website) or through release of information by one party (resulting for example in publication of the arbitrators' names in the specialized press, such as *Global Arbitration Review* or *Investment Arbitration Reporter*).

[9] The various stages of selection of judges in adjudicatory bodies and case assignment methods are presented in detail in the CIDS Supplemental Report, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf.

some cases, a State may appoint a single candidate, or member States as a group may put forward a limited number of candidates, and the candidates as a whole then undergo an election process. For example, in the case of the International Court of Justice (ICJ), the General Assembly and Security Council make the appointments (fifteen judges in total), and in the case of the European Court of Human Rights (ECHR), the Parliamentary Assembly of the Council of Europe elects one of three candidates for each seat (with 41 judges in total). The nomination process involves formal and informal meetings between candidates and permanent representatives of member States.

17. The Iran-United States Claims Tribunal broadly follows the UNCITRAL Arbitration Rules,[10] but has modified the appointment process as follows. Each of the Islamic Republic of Iran and the United States of America appoints three judges, and a list procedure is used to appoint the three remaining judges. Where the list procedure fails, or the Appointing Authority is otherwise required to appoint the judges, it is under an obligation under article 6.4 of the Tribunal Rules to "secure the appointment of an independent and impartial arbitrator".

18. The World Trade Organization (WTO) Dispute Settlement Understanding (DSU) addresses appointments to the Appellate Body of WTO.[11] It provides that consensus among WTO members is required for appointment (or re-appointment) of seven members to the body (which sits in three-member panels). There has also been a practice of automatic re-appointment, other than in cases of infirmity, performance concerns or misconduct, though lack of consensus recently has led to some seats remaining vacant.

(c) Impact of the selection process on diversity and competence

Diversity

19. The Working Group may wish to consider the impact of the appointment mechanisms on the question of diversity of appointed arbitrators in ISDS.

20. At the 35th session, there was a broad view in the Working Group that there was a limited number of individuals that were repeatedly appointed as arbitrators, and consequently that were repeatedly taking decisions, in ISDS cases. The Working Group has also noted a lack of diversity in terms of gender, geographical distribution, ethnicity and age (A/CN.9/935, para. 70).

21. In addition, the Working Group has noted the following potential impacts of a lack of diversity in arbitrator appointment: a lack of arbitrators that understand the policy considerations in developing countries; possible negative impacts on correctness of decisions made; concerns at perceptions of a lack of impartiality and independence on the part of arbitrators (A/CN.9/935, para. 70).

[10] The Tribunal was established following the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1 Iran-United States C.T.R. at 9-12, January 19, 1981. Article III Paragraph 2 of the Claims Settlement Declaration states that "2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply mutatis mutandis to the appointment of the Tribunal."

[11] Article 17.2.

22. The Working Group may also wish to consider whether diversity is a desirable quality in itself.[12] Respondents to a recent survey indicated that they had lost appointments as arbitrators because of diversity factors.[13]

23. The Working Group has also noted that repeated appointments might raise problems of arbitrator availability and increased costs and duration of proceedings, and that addressing diversity might contribute to resolving concerns about conflicts of interest (A/CN.9/935, para. 71).

24. Regarding gender diversity, the proportion of female arbitrators in investment treaty tribunals has been regularly surveyed in a variety of publications, though the data are not all fully comparable. In broad terms, a detailed study in 2006 of the then 102 publicly-available awards concluded that 5 out of 145 arbitrators were women (approximately 3 per cent).[14] As of 1 March 2012, based on the 254 "concluded cases" from 1972-2012 published on the ICSID website, it was concluded that 43 out of 745 arbitrators were women (5.63 per cent). A similar analysis by the SCC in 2015 found that 39 out of 279 appointments were women.[15] By comparison, a 2011 analysis for institutional appointments in international arbitration more generally (ISDS and international commercial arbitration) found that an estimated 6 per cent of arbitrators were women, increasing to 17 per cent by 2016.[16] However, it has also been suggested that in terms of the number of appointments as international arbitrators, there is no significant difference in the number of appointments women and men obtained. Various surveys also indicate that arbitral institutions are much more willing to appoint female arbitrators than the parties are.

25. International courts and tribunals have also received criticism for a lack of female judges. While the statutes of the ICJ and ITLOS do not refer to gender diversity, the more recent ICC Statute, in contrast, requires the States Parties to take into account "a fair representation of female and male judges".[17] Commentators report higher gender parity in the ICC, and in criminal and human rights courts more generally,[18] than in other bodies. As at the time of writing, there is a greater representation of female judges at the ICC (7/18) than on either ITLOS (3/21) or the ICJ (3/15).

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[12] In a recent survey, 50 per cent of respondents thought that it was desirable to have gender balance on arbitral tribunals, but 41 per cent thought that "it makes no difference". Responses on ethnicity and national background followed a similar pattern. Eighty per cent and 64 per cent, respectively, said too many arbitrators were white or from Western Europe and North America, but only 54 per cent responded that ethnic balance on a tribunal was desirable, with 31 per cent saying that "it makes no difference". See the BLP Interna..onal Arbitration Survey, 2016, available at http://www.blplaw.com/media/download/BLP-_Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf.

[13] Six per cent of respondents believed that they had lost appointments as a result of their ethnicity, 23 per cent thought they had lost appointments as a result of their gender, 28 per cent of respondents believed that they had lost appointments because they were considered too young, 84 per cent thought too many male arbitrators, 64 per cent thought too many arbitrators from Western Europe or North America, 80 per cent too many appointed arbitrators are white. BLP International Arbitration Survey, 2016, ibid.

[14] See Susan D. Franck (2009), Development and Outcomes of Investment Treaty Arbitration, Harvard International Law Journal, Vol. 50(2). It has also been concluded that the median international arbitrator was a fifty-three-year-old man who was a national of a developed state reporting ten arbitral appointments, and the median counsel was a forty-six-year-old man who was a national of a developed state and had served as counsel in fifteen arbitrations. See, further, The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration, Columbia Journal of Transnational Law, Vol. 53, Page 429, 2015.

[15] See www.sccinstitute.comBabout4the4sccBnewsB2+15Bnew4sccstatistics4on4appointments4of4female4arbitrators.

[16] See Lucy Greenwood, C. Mark Baker, Is the balance getting better? An update on the issue of gender diversity in international arbitration, Arbitration International, Volume 31, Issue 3, 1 September 2015, Pages 413–423, https://doi.org/10.1093/arbint/aiv034.

[17] Art. 36(8)(a)(iii).

[18] https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1259&context=mlr.

26. In terms of repeated appointments of a limited number of arbitrators, of the 372 individuals appointed to ICSID tribunals from 1972 until 2011, 37 were appointed to around 50 per cent of the cases, and approximately one third had background education from only five universities. ICSID reported that, in 289 cases from January 1972 to May 2015, in nearly half of cases (45 per cent), the tribunals were composed of all Anglo-European arbitrators.[19] Analysis of case data indicates that, in 84 per cent of the cases, two or more of the tribunal members were Anglo-European, or the sole arbitrator was Anglo-European; and 11 cases (4 per cent) were arbitrated by entirely non Anglo-European tribunals.[20] More generally, studies indicate that arbitrators from the developing world received a statistically lower number of appointments than their developed world counterparts.[21]

27. The Working Group may also wish to note that arbitral institutions report that they are taking measures to expand the pool of arbitrators (A/CN.9/935, paras. 71–72). For instance, ICSID reported in 2017 on its efforts to increase diversity as follows: "An increasingly diverse group of arbitrators, conciliators and ad hoc committee members were named in 2017: 13 per cent of these appointments involved persons who served for the first time on an ICSID tribunal or ad hoc committee; 23 per cent of the first-time appointees were nationals of low or middle income economies, and 14 per cent of the new appointees were women. Overall, 93 individuals from 33 different countries of origin were appointed to serve as arbitrators, conciliators, or ad hoc committee members in 57 ICSID cases in 2017; 14 per cent of the total number of appointments in 2017 involved women. ICSID and the Respondent/State each appointed 43.5 per cent of these female appointees, while 13 per cent of female appointments were made jointly by the parties in the underlying arbitration. No female appointments were made by the Claimant/investor individually or by the co-arbitrators."[22] Acting as appointing authority 47 times in 2017, ICSID appointed 31 individuals of 25 different nationalities. About 23 per cent of the appointments by ICSID involved nationals of low or middle-income economies, and 21 per cent of ICSID appointees were women."[23]

28. By way of comparison, the ICJ Statute does not permit two judges from the same State among the fifteen judges appointed to the Court, and the entire bench is to represent geographical diversity and the world's principal legal systems.[24]

29. The International Tribunal for the Law of the Sea (ITLOS) has the same requirements. Historically, the five permanent members of the Security Council have maintained a judge on the ICJ of their own nationality. The remaining ten judges comprise two from each of the United Nations regional groups.[25] The WTO Understanding on rules and procedures governing the settlement of disputes (DSU) provides that WTO DSU membership as a whole shall be "broadly representative of membership of the WTO".[26]

Competence, arbitrators' qualifications

30. The Working Group considered the question of arbitrators' qualifications at its 35th session (A/CN.9/935, paras. 82–88). It was recalled that party-appointment provided the parties with the right to select arbitrators on the basis of their consideration of the desired qualifications and experience, though they did not have the same control over those of the presiding arbitrator (A/CN.9/935, para. 83).

[19] Reported statistics on ICSID arbitrations.

[20] BLP International Arbitration Survey, 2016, supra.

[21] See the second study referenced in footnote 14, supra.

[22] ICSID Annual Report 2017, available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf), characteristics — see WP.146. See also http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators.

[23] ICSID Annual Report 2017, p. 35.

[24] Statute, article 9.

[25] The International Criminal Court (ICC) comprises the same regional membership.

[26] World Trade Organization (WTO), Understanding on rules and procedures governing the settlement of disputes (DSU), Article 17.3.

31. It was generally noted that the qualifications of arbitrators or decision makers in ISDS cases should include an ability to take into account relevant issues of public interest or public policy, which were usually at stake in ISDS cases. It was said that ISDS cases could require expertise in matters of both public and private international law, and also that arbitrators might be called upon to make findings on matters of domestic law (A/CN.9/935, para. 83). The issue of whether arbitrators are adequately cognizant of public interest issues also relate to technical rules of procedure and evidence. For instance, rules of evidence regarding what documents are or are not privileged, or what evidence is or is not admissible, often reflect important public policies. When arbitrators do not follow those rules in arbitral proceedings, there are policy implications and may be implications for the outcomes of proceedings.[27]

32. The ICSID Convention, in the context of the individual requirements for designation to the ICSID Panels of Arbitrators and Conciliators by the Contracting States and the Chairman of the Administrative Council,[28] requires that "[p]ersons designated to serve on the Panels shall be persons of [...] recognized competence in the fields of law, commerce, industry or finance". It further specifies that "[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators" (article 14(1) ICSID Convention).[29]

33. By way of comparison, a number of statutes of international courts and tribunals follow the model of Article 2 of the ICJ Statute,[30] which essentially envisages two alternative professional profiles: judges are to be elected from among individuals eligible for appointment to a "high" or "the highest" judicial offices in their respective countries. As second alternative of eligible judges, the statutes of ICJ and other international judicial bodies mention "jurisconsults", which in essence refers to scholars and academics. In some cases, statutes simply require individuals to be jurists of "recognized competence" without indication of a specific legal area.[31] So for instance at ICJ, judges need to be of recognized competence in "international law". For judges appointed on specialized courts, however, the subject-matter jurisdiction may call for more specific qualifications.[32]

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[27] See Columbia Center on Sustainable Investment, Contribution, available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/UNCITRAL_WGIII_-_35th_session_-_CCSI_intervention_WP.142_Section_III.pdf.

[28] ICSID disputing parties (but not the Chairman) may appoint arbitrators from outside the Panels to arbitral tribunals. However, ICSID arbitrators appointed by the disputing parties from outside the Panels must also possess the qualities stated in Art. 14(1) of the ICSID Convention. See ICSID Convention, Arts. 40(1) and 40(2).

[29] Studies have shown that that in practice arbitrators in ISDS are generally drawn from the following fields of experience: professors in international public law, former judges (national or from the ICJ), retired diplomats and officials in foreign service or an international organization, practising lawyers who are, or were, partners in a law firm or barristers, migrating commercial arbitrators. See http://www.hrdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf. Also, OECD has noted: "[Arbitrators] are often lawyers, professors and former judges, who have reached very senior positions in their respective fields. According to a recent study of ICSID arbitrators, lawyers in private practice dominate the field with over 60 per cent of ICSID investment arbitrators in private practice. About one third are full-time academics. Approximately 40 per cent are specialists in public international law (including some lawyers in private practice). Government backgrounds are less represented, although a number of arbitrators have served as domestic or international judges. Few arbitrators are drawn from former investment treaty negotiators. The level of reliance in ISDS on commercial arbitrators has recently been the subject of press commentary." See Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

[30] Article 2 of the ICJ Statute, for instance, provides that: The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

[31] ECtHR Statute, Art. 21(1) ("jurisconsults of recognized competence").

[32] See e.g. requirements for WTO AB members under the DSU ("demonstrated expertise in law, international trade and the subject matter of the covered agreements generally"). Judges at the Inter-American Court of Human Rights ("IACtHR"), for example, must be experts "in the field

34. The Statute of ICC envisages an Advisory Committee to review nominations to assess whether the relevant appointment criteria have been met.[33] It was put into effect in 2015 (at which time nine members were appointed for a three-year term). A similar advisory panel of experts has been set up at the ECHR.

35. The Working Group may also wish to note that appointing parties provided the following feedback on arbitrator appointments a recent survey:

- Seventy per cent of respondents stated that they have access to enough information to make an informed choice about the appointment of arbitrators
- Respondents would like to have access to arbitrators' previous awards, know more about their approach to procedural and substantive issues and have a clear picture of their availability to take on new cases
- Eighty per cent of respondents would like to be able to provide an assessment of arbitrators at the end of a dispute. Nearly 90 per cent would do so by reporting to an arbitral institution.[34]

36. It was generally agreed in the Working Group that qualifications of the decision makers were important, and should be kept in mind by the Working Group, but that that particular point would not deserve the development of a specific tool (A/CN.9/935, para. 88).

III. Desirability of reform

1. Reform objectives

37. At the 35th session of the Working Group, it was mentioned that the desirability of reform should be considered also taking into account the following matters:

- That the benefits of the current system, such as its flexibility and neutrality, should be preserved;
- That the interests of all stakeholders in ISDS should be considered and that any solutions should ensure a balance of interests of stakeholders;
- That any solutions should avoid politicization, since the de-politicization of ISDS was a primary benefit of the current system (A/CN.9/935, para. 63).

38. The Working Group may also wish to consider the desirability of taking into account potential cross benefits between reforms to the appointment mechanism on other elements of the ISDS regime, including on independence and impartiality of arbitrators, on consistency and coherence in ISDS awards and on costs and duration of ISDs proceedings as well as overall consideration of transparency.

2. Preliminary views expressed by States

39. At its 35th session, the Working Group heard some preliminary views regarding possible reforms to the appointment mechanism for arbitrators.

40. There were also calls for arbitral institutions to play a greater role in the selection of arbitrators, and to establish more transparent procedures regarding the appointment of arbitrators. It was pointed out that little information about selection methods resulted in limited accountability in the system. It was suggested that the selection criteria should be published along with explanation of the selections (A/CN.9/935, para. 66).

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of human rights", 71 while International Tribunal for the Law of the Sea (ITLOS) judges must have expertise in the law of the sea.

[33] Article 36(4)(c).

[34] See the Queen Mary University of London and White & Case 2018 International Arbitration Survey: The Evolution of International Arbitration, available at http://www.arbitration.qmul.ac.uk/research/2018/.

41. Those who considered that party appointment created systemic concerns suggested that the ISDS regime could envisage appointments/selection of decision makers not being made by the parties but by an independent body. From this perspective, it was said that without the creation of a body with permanent judges, it would be unlikely that the identified concerns could be solved. In that context, it was mentioned that mechanisms used in other international courts and bodies such as the WTO Dispute Settlement Body could be considered (A/CN.9/935, para. 67).

42. In order to address the question of lack of diversity in ISDS, a suggestion was made to provide training to expand the pool of potential arbitrators and consider a roster system or systemic solution at a future time (A/CN.9/935, para. 74).

F. Other questions for consideration

43. The Working Group may wish to note that the questions below are also discussed in document A/CN.9/WG.III/WP.149, which provides a general framework for considering the desirability of reforms. The Working Group may also wish to take additional issues into consideration.

44. The Working Group may wish to consider the appointment mechanism, which has been designed to ensure flexibility and respect for party autonomy, but which has attracted criticism that arbitrators thus appointed lack legitimacy when addressing public interest issues. In this regard, the Working Group may wish to consider the issue of arbitrator remuneration. The Working Group may further wish to consider the mechanism in the context of its equivalent in other systems as discussed above.

45. The Working Group may also wish to consider the impact of the appointment mechanism on the expected role of arbitrators. In terms of their duties, public judges often are bound by rules that require them to dismiss cases pending elsewhere, or to dismiss cases for which relief has already been sought in other proceedings. As has been highlighted in discussions of parallel proceedings, however, tribunals have in some cases seemed to view themselves as self-contained entities, handling the case before them and not feeling bound to consider what is happening or has happened in parallel proceedings, nor bound to consider the systemic issues that such parallel proceedings raise.

46. The Working Group may additionally wish to consider the questions of transparency in the appointment processes and the impact of the appointment mechanisms on the diversity of arbitrators appointed in ISDS cases.

47. A further question for consideration would concern the authority of arbitrators to consider certain issues of public interest, impacts of decisions on non-parties, questions regarding the applicable standard of review, and whether and to what extent tribunals can scrutinize decisions of fact or law made at the domestic level. This matter concerns the inherent and implied powers of arbitral tribunals.

48. The Working Group may wish to consider whether diversity on adjudicatory bodies is necessary in its own right to enhance the legitimacy of a dispute settlement system in the public perception. In the current decentralized ad hoc framework, those in charge of selecting arbitrators are subject to little pressure to diversify appointments. This feature, coupled with the lack of transparency of the appointment process, entails that efforts to advance diversity depend exclusively on the goodwill and self-regulation of the actors involved in the arbitral process. However, the Working Group may also wish to consider whether a move towards a more centralized process of selecting decision makers will necessarily result in greater diversity (or, alternatively, whether it could result in less diversity among decision makers). From this perspective, the Working Group may wish to consider the benefits of formal incorporation of diversity considerations into the selection criteria.